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Opinion following transfer from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DWAYNE GILES,<br><br>Defendant and Appellant. | 2d Crim. No. B166937<br>(Super. Ct. No. TA066706)<br>(Los Angeles County)<br><br>OPINION ON TRANSFER FROM THE CALIFORNIA SUPREME COURT |

Appellant Dwayne Giles was sentenced to prison for a term of 50 years to life after a jury convicted him of first degree murder and found true an allegation that he had personally discharged a firearm causing great bodily injury or death. (Pen.Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).)[1] He contends he was denied his Sixth Amendment right to confront witnesses because the trial court admitted hearsay evidence of statements by the murder victim regarding a prior act of domestic violence. He also argues that his conviction must be reduced to second degree murder because the evidence was insufficient to show that he acted with premeditation and deliberation. In our prior opinion we affirmed the judgment.

[1] All statutory references are to the Penal Code unless otherwise stated.

The California Supreme Court affirmed. (*People v. Giles* (2007) 40 Cal.4th 833.) The United States Supreme Court granted appellant's petition for writ of certiorari. It vacated and remanded the matter, holding that appellant did not forfeit his right to confront the victim's statement unless he killed her with the intent to prevent her from testifying. (*Giles v. California* (2008) __ U.S. ___, 128 S.Ct. 2678, 2648.) Our Supreme Court transferred the cause back to this court with directions to vacate our previous decision and to resolve any remaining issues in light of *Giles v. California.* At our request, counsel submitted supplemental briefing. We issue a new opinion and reverse.

FACTS

Appellant dated Brenda Avie for several years. On the night of September 29, 2002, he was staying at his grandmother's house along with several other family members. Appellant was out in the garage socializing with his niece Veronica Smith, his friend Marie Banks, and his new girlfriend Tameta Munks when appellant's grandmother called him into the house to take a telephone call from Avie. He returned to the garage and spoke to Munks, who then left.

Avie arrived at the house about 15 minutes later, after Munks had already left. She conversed with Smith and Banks in the garage for about half an hour. Smith went into the house to lie down and heard Avie and Banks leaving the garage together. A few minutes later, she heard appellant and Avie speaking to one another outside in a normal conversational tone. Avie then yelled, "Granny" several times, and Smith heard a series of gunshots.

Smith and appellant's grandmother ran outside and discovered appellant holding a nine-millimeter handgun and standing about 11 feet from Avie, who was bleeding and lying on the ground. Appellant's grandmother took the gun from him and called 911. Smith drove appellant away from the house at his request, but he jumped out of her car and ran away after they had traveled several blocks. Appellant did not turn himself in to police and was eventually arrested on October 15, 2002.

Avie had been shot six times in the torso area. Two of those wounds were fatal; one was consistent with her holding up her hand at the time she was shot; one was

consistent with her having turned to her side when she was shot; and one was consistent with the shot being fired while she was lying on the ground. Avie was not carrying a weapon when she was shot.

Appellant testified at trial and admitted shooting Avie, but claimed he had acted in self-defense. He explained that he had a tumultuous relationship with Avie and was trying unsuccessfully to end it. Avie would get very jealous of other women, including Munks, whom he had been dating. Appellant knew that Avie had shot a man before she met him, and he had seen her threaten people with a knife. He claimed that Avie had vandalized his home and car on two separate occasions.

According to appellant, he had a "typical" argument with Avie when she called him on the telephone on the day of the shooting. He told her Munks was at the house and Avie said, "Oh, that bitch is over there. Tell her I'm on my way over there to kill her." Appellant told Munks to leave because he was worried about the situation, and Avie arrived soon after. Appellant told everyone to leave and began closing up the garage where they had congregated. Avie walked away with Marie Banks, but she returned a few minutes later and told appellant she knew Munks was returning and she was going to kill them both. Appellant stepped into the garage and retrieved a gun stowed under the couch. He disengaged the safety and started walking toward the back door of the house. Avie "charged" him, and appellant, afraid she had something in her hand, fired several shots. Appellant testified that it was dark and his eyes were closed as he was firing the gun. He claimed that he did not intend to kill her.

Marie Banks testified that she had seen appellant and Avie get into arguments before. Avie seemed angry when she came to appellant's grandmother's on the day of the shooting, and she talked to appellant for about half an hour until appellant told everyone to leave. Avie and Banks left together, but as they were walking away they saw Tameta Munks. Avie said, "Fuck that bitch. I'm fixin' to go back." She walked back toward appellant's grandmother's house and Banks went home. Banks did not see the shooting itself.

A few weeks before the shooting in this case, police officers investigated a report of domestic violence involving appellant and Avie. Evidence about the incident was offered by the prosecution to prove appellant's propensity for domestic violence under Evidence Code section 1109. Officer Stephen Kotsinadelis testified that when he and his partner responded to a call on September 5, 2001, appellant answered the door, apparently agitated, and allowed him to enter. Avie was sitting on the bed, crying. Kotsinadelis interviewed Avie while his partner spoke to appellant in a different room. Avie said she had been talking to a female friend on the telephone when appellant became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with appellant, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but appellant climbed on top of her and punched her in the face and head. After Avie broke free again, appellant opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you." Officer Kotsinadelis saw no marks on Avie, but felt a bump on her head. Avie's hearsay statements to Officer Kotsinadelis were admitted over defense counsel's objection pursuant to Evidence Code section 1370. *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) had not yet been decided and no confrontation clause objection was raised.

## DISCUSSION

### *Right of Confrontation*

Appellant argues that the admission of Avie's statements to Officer Kotsinadelis violated his Sixth Amendment right to confront witnesses under the principles enunciated in *Crawford.* In our initial opinion we rejected this contention, concluding that appellant forfeited his right of confrontation because he procured the declarant's absence by his own wrongdoing. Upon reconsideration in light of the United States Supreme Court's subsequent decision in this case, we agree. The prosecution did not establish that appellant procured the declarant's absence with the intent to prevent her from testifying. The error was not harmless beyond a reasonable doubt. The judgment must be reversed.

The trial court correctly ruled that Avie's statements fell within the statutory exception to the hearsay rule for out-of-court statements describing the infliction of physical injury upon the declarant when the declarant is unavailable to testify at trial and the statements are trustworthy. (Evid. Code, § 1370.) The statements are nevertheless inadmissible if they run afoul of the confrontation clause. (*Crawford, supra,* 541 U.S. 36.)

In *Crawford*, the Court announced that the confrontation clause bars admission of testimonial hearsay unless the declarant is unavailable and the defendant has had an opportunity to cross-examine the declarant. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford, supra,* 541 U.S. at pp. 68-69.) It is undisputed that Avie was unavailable for trial.

*Testimonial Hearsay*

On the limited record available, we conclude that Avie's statements were testimonial, because they were made in response to a focused police interview aimed at establishing the circumstances of a crime. (*People v. Cage* (2007) 40 Cal.4th 965, 984.) We reach this conclusion without prejudice to the trial court's assessment of any foundational showing that may be made on retrial.

*Crawford* did not provide a comprehensive definition of "testimonial." The term applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford, supra*, 541 U.S. at p. 68.) Unsworn statements are also testimonial within the meaning of *Crawford* if they are "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id*. at p. 52.) An unsworn statement to an officer in the field is testimonial if it occurs under circumstances that impart formality and solemnity and it is taken primarily for the purpose of proving a past fact for possible use in a criminal trial. (*People v. Cage, supra,* 40 Cal.4th at p. 984.) Statements obtained through police questioning in the field are non-testimonial when the primary purpose of the questioning is to deal with a contemporaneous emergency. (*Ibid.*)

Here, Officer Kotsinadelis testified that he knocked on the door and was admitted by appellant, whose speech was rapid. Avie was sitting on a bed, crying. Kotsinadelis "interviewed" Avie outside the presence of appellant. Avie had no visible injuries, but he felt a bump on her head. Appellant told him where his knife could be found.

Because appellant was tried pre-*Crawford*, the trial court did not have an opportunity to consider whether the statements were testimonial and the prosecutor did not develop a record concerning the primary purpose of Officer Kotsinadelis' questioning or any contemporaneous emergency circumstances that may have existed. As a proponent of the evidence, it was the prosecutor's burden to establish preliminary facts necessary to admission. (Evid. Code, § 403, subd. (a).) In the absence of sufficient evidence in this record of a contemporaneous emergency that might render the statements non-testimonial, we must conclude that the statement was testimonial.

*Forfeiture by Wrongdoing*

The statements would nevertheless have been admissible if appellant forfeited his right to confront Avie by killing her. A defendant who has rendered a witness unavailable for cross-examination through a criminal act forfeits his or her right to confront them, but only if his conduct was designed to prevent the witness from testifying. (*Giles v. California, supra*, __ U.S. __, 128 S.Ct. at p. 2693.) In the domestic violence context, if "an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution--rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." (*Id.* at p. 2693.)

Because the prosecutor presented no evidence that appellant killed Avie with intent to prevent her from testifying or cooperating in a criminal prosecution, we must conclude on this record that admission of Avie's statement ran afoul of the

confrontation clause. This conclusion is also without prejudice to the trial court's assessment of any foundational showing upon retrial. The trial court "is free to consider evidence of the defendant's intent on remand." (*Giles v. California, supra,* __ U.S. __, 128 S.Ct. at p. 2693.)

*Error Not Harmless Beyond A Reasonable Doubt*

Where a defendant's Sixth Amendment right to confront witnesses is violated, we apply the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Cage, supra,* 40 Cal.4th at 991.) Whether the error was harmless beyond a reasonable doubt depends on factors including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

After reviewing the entire record, we conclude that a reasonable doubt exists whether the admission of Avie's statements contributed to the jury's verdict. Avie's statements were important. As respondent correctly notes, Avie was unarmed and physical evidence suggested that appellant continued to shoot her after she hit the ground. Appellant admitted shooting Avie and relied entirely on self-defense, perfect and imperfect. Avie's statements to the officer that appellant threatened to kill her were not corroborated by other evidence, and tended to contradict appellant's testimony that he did not intend to kill her and that he shot her out of fear for his own safety based on her past threats, acts against his property, and knowledge that she had previously killed a man. In closing argument, the prosecutor used Avie's out-of-court statements to rebut the claim of self-defense by arguing that appellant had been violent with Avie before when he "took out a knife and threatened her and said he was going to kill her." Avie's statements were not cumulative. The admission of the statements was not harmless beyond a reasonable doubt and requires reversal.

Although we reverse the judgment, we address appellant's remaining contention for guidance to the trial court in the event of retrial.

*Sufficiency of the Evidence-Premeditation and Deliberation*

Appellant contends the evidence was insufficient to prove that he acted with the premeditation and deliberation necessary to support his conviction of first degree murder. We review the entire record to determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The evidence must be viewed in the light most favorable to the judgment, and reversal is unwarranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We will uphold a judgment against a sufficiency challenge when the circumstances reasonably justify the jury's factual findings, even if the circumstances could be reconciled with a contrary finding. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

In the context of a first degree murder conviction, "premeditated" means "considered beforehand" and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (CALJIC No. 8.20; *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'" (*Mayfield*, at p. 767.)

Viewed in the light most favorable to the judgment, the evidence showed that appellant retrieved a loaded gun from inside the garage after Avie returned to the house. He prepared it to fire by disengaging its safety and then shot her six times in the torso area of her body. One of the investigating officers testified that a semiautomatic firearm such as the one used by appellant fires only once each time the trigger is pulled, meaning that appellant would have had to pull the trigger for each shot. A reasonable jury could infer that appellant made a cold and calculated decision to take Avie's life after

rapidly weighing the considerations for and against this course of action. (See *People v. Mayfield, supra*, 14 Cal.4th at p. 767.)

Citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, appellant argues that a finding of premeditation and deliberation must be supported by evidence of a motive to kill, planning activity, or an exacting manner of killing. He acknowledges that his professed desire to end his relationship with Avie gave him some motive to kill her, but claims this circumstance was too "speculative" to itself support a first degree murder verdict. The factors enunciated in *Anderson* provide a framework for evaluating the evidence of premeditation on appeal, but they are neither necessary nor exclusive. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) In any event, an application of those factors tends to support, rather than refute, the first degree murder verdict in this case. Appellant's desire to end his relationship with Avie supplied a motive to kill, his retrieval of the gun from the garage was evidence of planning, and the number and placement of the shots fired "was entirely consistent with a preconceived design to take his victim's life." (*People v. Mayfield, supra*, 14 Cal.4th at p. 768.) The evidence of premeditation and deliberation was more than adequate to support the verdict of first degree murder.

The judgment is reversed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Victoria M. Chavez, Judge

Superior Court County of Los Angeles

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